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8
9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION

12 PEOPLE AGAINST DRUGS AFFORDABLE
13 PUBLIC HOUSING, INC. DBA/PAD
14 MOTOR SPORTS/GREEN LIGHT RACING,

Plaintiff,

15 v.

16 ELECTRONIC ARTS, INC. DBA EA
17 SPORTS,

18 Defendant.

Case No. C-07-4693-MMC

**DEFENDANT ELECTRONIC ARTS
INC.'S NOTICE OF MOTION AND
MOTION TO DISMISS OR,
ALTERNATIVELY, TO STRIKE;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

Date: November 9, 2007

Time: 9:00 a.m.

Courtroom: 7

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TREATISE

1 Witkin Summary of California Law, Ch. I (Contracts) § 87611

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on November 9, 2007, at 9:00 a.m., or as soon thereafter
3 as may be heard, before the Honorable Maxine M. Chesney of the United States District Court
4 for the Northern District of California, defendant Electronic Arts Inc. ("EA") will, and hereby
5 does, move the Court pursuant to the Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and
6 12(f) for an Order dismissing the Complaint, or in the alternative, striking portions of plaintiff
7 People Against Drugs Affordable Public Housing, Inc.'s ("PAD's") prayer for relief.

8 EA moves for dismissal because PAD lacks standing and because the Complaint fails to
9 state a claim upon which relief can be granted. In the alternative, EA moves to strike as
10 immaterial the portions of the prayer for relief that seek punitive damages, exemplary damages,
11 and attorneys' fees, because those forms of relief are unavailable as a matter of law.

12 This Motion is based on this Notice of Motion and Motion; the Memorandum of Points
13 and Authorities below; all pleadings and papers filed herein; oral argument of counsel; and any
14 other matter that may be submitted at the hearing.

STATEMENT OF ISSUES TO BE DECIDED (Civil L.R. 7-4(a)(3))

1
2 1. A parent corporation generally lacks standing to enforce its subsidiary's contract.
3 Also, a third party only has standing to enforce a contract that expressly shows an intent to
4 benefit the third party. PAD's subsidiary (Green Light Racing) – and not PAD – entered into the
5 contract at issue here. Moreover, the contract does not show any intent to benefit PAD. Should
6 the Complaint be dismissed for PAD's lack of standing to enforce the contract?

7 2. To state a claim for breach of contract, PAD must allege the breach of some
8 specified contractual duty. The contract expressly granted EA absolute discretion to do what
9 PAD now characterizes as a breach. Should the Complaint be dismissed for failure to state a
10 claim for breach of contract?

11 3. The alleged breach must have proximately caused the damages claimed. Thus,
12 general damages must have been foreseeable at the time the parties made the contract, and the
13 defendant must have known – or should have known – of any special damages. PAD alleges
14 damages that, on the face of the Complaint, could not have been foreseen at the time the parties
15 made the contract – nor is there any allegation that EA knew or should have known of the
16 potential for such damages. Should the Complaint be dismissed for failure to state a claim for
17 breach of contract?

18 4. Punitive and exemplary damages are not available in a breach of contract claim.
19 Also, the prevailing party is entitled to attorneys' fees only where a contract or statute expressly
20 confers that right. That right is not available here. Should the portions of PAD's prayer for
21 relief seeking punitive damages, exemplary damages, and attorneys' fees be stricken?
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I. INTRODUCTION

In April 2007, Green Light Racing (a NASCAR racing team) entered into a license agreement with Electronic Arts Inc., a developer and publisher of video and computer games. The agreement permitted, but did not obligate, EA to use any of Green Light's logos or other identifiable characteristics in EA's games. Consistent with the license agreement, EA used images of a Green Light vehicle in its *NASCAR 08* game, which was released in July 2007.

Plaintiff People Against Drugs Affordable Public Housing, Inc. ("PAD") claims it is a non-profit organization and the parent of Green Light. It alleges that EA breached the license agreement by including the image of the actual Green Light racing team truck in *NASCAR 08*, which differs from the fictitious design that PAD wanted EA to use. It claims this alleged breach has threatened its non-profit status and Green Light's continued viability, causing it millions of dollars in damage.

The law does not recognize the wrong alleged in the Complaint. For the following four independent reasons, the Complaint should be dismissed in its entirety or, in the alternative, should be stricken in part.

First, plaintiff PAD lacks standing because it is not a party to the contract it seeks to enforce, nor is it an intended third-party beneficiary. The Complaint therefore should be dismissed under Fed. R. Civ. P. 12(b)(1).

Second, even if PAD were a proper plaintiff, PAD does not and cannot allege that EA breached any contractual duty. PAD claims that EA used an image of the Green Light racing team truck in *NASCAR 08* that was different from the image that PAD wanted EA to use. That, however, is not a breach of the license agreement. The license agreement granted EA absolute discretion to include (or not include) any image of the Green Light racing team truck. EA had no obligation to use a fanciful rendering of the Green Light racing team truck instead of the image it used of the actual truck. Because PAD alleges no contractual duty that EA breached, the Complaint should be dismissed under Fed. R. Civ. P. 12(b)(6). Dismissal should be with prejudice because under the terms of the license agreement, neither PAD nor Green Light could allege that EA's use (or non-use) of any specific Green Light image in any specific game was a

1 breach of the license agreement.

2 Third, PAD does not allege a viable theory of damages. The Complaint fails to explain
3 how EA's alleged conduct (*i.e.*, EA's including in a video game an image of the actual Green
4 Light Racing truck instead of the fictionalized image PAD claims it wanted) proximately caused
5 PAD's alleged injuries (that the publication of a newspaper article in the *Dallas Business Journal*
6 article has threatened the racing team's business and PAD's status as a non-profit organization).
7 The alleged damages are not foreseeable general damages. Nor are they special damages about
8 which EA is alleged to have known or should have known. On the face of the Complaint, the
9 true causes of PAD's alleged injuries clearly have nothing to do with EA, including PAD's
10 apparently aggressive interpretation of Federal tax law, a competitive business climate among
11 NASCAR teams, and the *Dallas Business Journal's* reporting of and publication of its article
12 (whose accuracy PAD does not dispute). Because PAD's allegations of damages are fatally
13 flawed, the Complaint should be dismissed under Fed. R. Civ. P. 12(b)(6).¹

14 Fourth, even if PAD had stated a claim properly, its request for punitive damages,
15 exemplary damages, and attorneys' fees should be stricken under Fed. R. Civ. P. 12(f), because
16 California law does not authorize the award of such damages in this case, as a matter of law.

17 II. BACKGROUND²

18 PAD claims to be a tax-exempt, non-profit charitable corporation whose "purposes are to
19 provide affordable housing to tenants in a drug-free environment and to educate teenagers about
20 the dangers of drug use." Exhibit 1 attached hereto (July 9, 2007 *Dallas Business Journal*
21 article)³, at 4; Complaint ("Compl.") ¶ 1. While it is unclear how owning a NASCAR racing
22

23 ¹ Green Light Racing is not a non-profit corporation. Therefore, even if it were a plaintiff, it
24 could not assert a damages theory akin to PAD's: that the alleged breach threatens its not-for-
profit status.

25 ² Because the Court accepts all well-pled factual allegations as true in ruling on a motion to
26 dismiss, *see Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005), EA sets forth the facts
alleged in the Complaint and materials incorporated by reference into the Complaint. EA does
not admit the truth of any of the facts set forth herein.

27 ³ Under the incorporation by reference doctrine, the Court may consider the *Dallas Business*
28 *Journal* article attached as Exhibit 1 to this motion, "whose contents are alleged in [the]
complaint and whose authenticity no party questions." *Knievel*, 393 F.3d at 1076 (quoting *In re*
Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 986 (9th Cir. 1999), and affirming dismissal).

1 team furthers its charitable purposes, PAD purports to be the sole owner of Green Light Racing,
 2 a NASCAR truck team. Compl. ¶¶ 7-8; Ex. 1 (Article), at 1. Green Light and PAD are separate
 3 corporations. Compl. ¶ 8.

4 In April 2007, Green Light – not PAD – entered into a Driver and Team License
 5 (“License”) with EA, a leading developer and publisher of video and computer games. Compl.
 6 ¶ 9, 11 & Ex. A. Green Light granted EA the “right and license, but not the obligation, to use,
 7 reproduce, perform and display (publicly or otherwise), broadcast, distribute and transmit the
 8 names, trademarks, copyrights, word marks, service marks, trade dress and associated logos of
 9 [Green Light]” and related materials relating to Green Light’s sponsors and cars, “on, in and in
 10 connection with the advertising and marketing of, Licensed Products.” Compl. Ex. A ¶ I(b)
 11 (emphasis added).⁴

12 Green Light promised, “[a]s reasonably requested by EA, [to] deliver to EA photographs,
 13 models and other data, information or materials in [Green Light’s] possession which display the
 14 Team Cars, Team Marks, and/or the Sponsor Marks, and which are necessary or desirable for EA
 15 to authentically recreate the Team Cars, Team Marks, and/or Sponsor Marks in the Licensed
 16 Products.” Compl. Ex. A ¶ II (emphasis added). Green Light further agreed to “cooperate
 17 reasonably with EA in granting access to the Team Cars to allow EA to collect its own data and
 18 information and to take photographs or shoot videotape of the Team Cars.” Compl. Ex. A ¶ II.

19 The Complaint alleges that sometime after the License was executed, Green Light
 20 provided EA with a rendering of Green Light’s “Number 08” truck bearing the logos “People
 21 Against Drugs” and “Be Drug Free.” Compl. ¶ 13 & Ex. B. This rendering differed
 22 substantially from the appearance of the actual Number 08 truck, which confines the “People
 23 Against Drugs” logo to a 4-inch by 4-inch space on the truck. *See* Ex. 1 (Article), at 3. The
 24 actual Number 08 truck is known as the “Garmin/GPS Store 08” truck, after its primary sponsor.
 25 Ex. 1 (Article), at 2.

26 Paragraph 18 of the Complaint alleges the contents of the *Dallas Business Journal* article.

27 ⁴ “Licensed Products” include, among other things, certain “interactive software product[s]
 28 published or developed by EA or under license from EA.” Compl. Ex. A, at 3 ¶ 1.03. The
 License identifies no specific EA products.

1 In June 2007, the Dallas Business Journal interviewed PAD's executive director, Gene
 2 Christensen, for an article entitled "Nonprofit Fuels Race Team" that examined the connection
 3 between PAD and Green Light. Compl. ¶ 18. Mr. Christensen told the reporter that "his truck"
 4 would be included in EA's *NASCAR 08* game, bearing the fictitious "People Against Drugs" and
 5 "Be Drug Free" logos. Compl. ¶ 18; Ex. 1 (Article), at 3. The reporter then contacted EA. In
 6 response to the reporter's inquiries, EA said that in the *NASCAR 08* game, the "Number 08"
 7 truck would appear as it does in the actual NASCAR racing circuit and, thus, would bear the
 8 logos of the truck's primary sponsor: Garmin/GPS Store. Ex. 1 (Article), at 3.

9 On July 6, 2007, the Dallas Business Journal published its article about the connection
 10 between PAD and Green Light. Ex. 1 (Article). PAD alleges that the article "questioned the
 11 honesty of Mr. Christensen and [PAD's] 501(c)(3) status." Compl. ¶ 18. PAD further alleges
 12 that "[a]s a result of this article, [PAD's] non-profit status has been jeopardized and Green Light
 13 Racing's long term viability has been compromised, all as the proximate result of the breach of
 14 contract by [EA]." Compl. ¶ 18.

15 EA released *NASCAR 08* on July 23, 2007. Compl. ¶¶ 16-17. PAD filed this action on
 16 September 12, 2007. EA now moves to dismiss the complaint in its entirety, or, in the
 17 alternative, moves to strike portions of PAD's prayer for relief.

18 III. ARGUMENT

19 A. PAD Lacks Standing to Enforce the Contract Between Green Light and EA.

20 PAD is not a party to the contract it seeks to enforce. *See* Compl. Ex. A, at 1. Instead,
 21 Green Light – a separate corporation – entered into the license agreement with EA. *See* Compl.
 22 ¶¶ 1, 7, 8. PAD does not have standing to enforce the License simply because the signatory,
 23 Green Light, is PAD's wholly owned subsidiary. "[A] parent corporation and its subsidiary are
 24 legally distinct entities, and a contract under the corporate name of one is not treated as that of
 25 both." *Nat'l Rural Telecommunications Cooperative v. DIRECTV, Inc.*, 319 F. Supp. 2d 1040,
 26 1057 (C.D. Cal. 2003). To grant PAD standing solely because of its parent corporation status
 27 would shield a parent from liability for the subsidiary's obligations (under the corporate law
 28 principle of limited liability), while allowing the parent standing to enforce those very same

1 obligations.

2 As a non-party to the License, PAD only has standing to enforce that contract if it is an
3 intended third party beneficiary of the agreement. *Nelson v. Anderson*, 72 Cal. App. 4th 111,
4 130 (1999) (“One who is not a party to a contract has no right to enforce it unless he is an
5 intended third-party beneficiary of the contract.”). But PAD has not alleged (and cannot allege)
6 – as it must – that the contract was “made expressly for the benefit of the third person [*i.e.*
7 PAD].” Cal. Civ. Code § 1559 (emphasis added).⁵ “Expressly means in an express manner, in
8 direct or unmistakable terms; explicitly; definitely; directly.” *Sofias v. Bank of America*, 172
9 Cal. App. 3d 583, 587 (1985) (quotations omitted). Thus, the intent to benefit PAD must
10 “appear[] from the terms of the contract.” *Lazar v. Trans Union LLC*, 195 F.R.D. 665, 674-75
11 (C.D. Cal. 2000) (granting motion to dismiss without leave to amend, where the relevant
12 contracts showed no such intent).

13 No intent to benefit PAD appears anywhere in the License. *See* Compl. Ex. A. In fact,
14 the License makes no mention of PAD. *See id.* Where a contract shows no intent to benefit the
15 purported third-party beneficiary, the Complaint must be dismissed. *See Goodrich &*
16 *Pennington Mortgage Fund, Inc. v. Chase Manhattan Mortgage Corp.*, No. 05-CV-636-L(POR),
17 2007 U.S. Dist. LEXIS 8307, at *7 (S.D. Cal. Feb. 5, 2007) (granting motion to dismiss where
18 plaintiff claimed to be a third party beneficiary, but “no such intent appears from the terms” of
19 the agreements.).

20 Applying this rule, the California Court of Appeal recently affirmed the sustaining of a
21 demurrer without leave to amend where a group of emergency physicians sued a health care plan
22 for breach of insurance policies issued by the health care plan. *Cal. Emergency Physicians Med.*
23 *Group v. PacifiCare of Cal.*, 111 Cal. App. 4th 1127 (2003). The Court held that the physicians
24 were not third party beneficiaries of the insurance policies. *Id.* at 1138. The Court reasoned that
25 “[t]hird party beneficiary status is a matter of contract interpretation,” and the “policies do not
26

27 ⁵ The License provides that it “shall be governed by and interpreted in accordance with the
28 substantive laws of the State of California (without regard to its choice of law rules) and the
copyright laws of the United States.” Compl. Ex. A, at 6 ¶ 7.02. PAD acknowledges that
California law should apply. Compl. ¶ 4.

1 show an intention to benefit noncontracting providers [such as plaintiffs], who are not mentioned
 2 in the contract.” *Id.* As such, the physicians had failed to satisfy the requirement that a third
 3 party beneficiary “plead a contract which was made expressly for his benefit and one in which it
 4 clearly appears that he was a beneficiary.” *Id.* (quoting *Luis v. Orcutt Town Water Co.*, 204 Cal.
 5 App. 2d 433, 441 (1962)). The same rule applies here: because the License shows no intent to
 6 benefit PAD, PAD lacks standing to bring this action.

7 Because PAD is neither a signatory to the License nor an intended third party beneficiary,
 8 PAD lacks standing. This action therefore should be dismissed under Fed. R. Civ. P. 12(b)(1).

9 **B. PAD Alleges No Breach by EA of Any Contractual Duty.**

10 The Complaint must be dismissed for the separate and independent reason that it does not
 11 allege an essential element of a breach of contract claim: EA’s breach of some contractual duty.
 12 *See Careau & Co. v. Sec. Pac. Bus. Credit, Inc.*, 222 Cal. App. 3d 1371, 1388 (1990) (elements
 13 of breach of contract). The License expressly grants EA absolute discretion to include (or not
 14 include) in its video games any of Green Light’s “names, trademarks, copyrights, word marks,
 15 service marks, trade dress and associated logos.” Compl. Ex. A ¶ I(b). PAD alleges EA
 16 breached the License when EA exercised its discretionary power and used in *NASCAR 08* the
 17 image of the actual Green Light truck from the NASCAR racing circuit, “refused” to include the
 18 fictionalized image of the truck PAD wanted EA to use, and did not seek “comment or approval
 19 from Green Light as to the finished representation of the Number 08 truck.”⁶ Compl. ¶¶ 15-17.
 20 PAD’s allegations—even accepted as true—do not amount to a breach by EA of any contractual
 21 duty owed to PAD or Green Light.

22 The License does not obligate EA to include any images of Green Light’s trucks, or a
 23 particular rendering of those trucks, in any video game – or in *NASCAR 08* specifically. Green
 24 Light granted EA the “right and license, but not the obligation, to use, reproduce, perform and
 25 display (publicly or otherwise), broadcast, distribute and transmit the names, trademarks,
 26 copyrights, word marks, service marks, trade dress and associated logos of [Green Light]” and
 27

28 ⁶ It is worth noting that the Complaint alleges that EA should have allowed Green Light, not
 plaintiff PAD, the right to “comment and approve.”

1 related materials relating to Green Light's sponsors and cars, "on, in and in connection with the
 2 advertising and marketing of, Licensed Products." Compl. Ex. A ¶ I(b) (emphasis added).⁷
 3 Through the License, EA obtained the option to "use, reproduce, perform and display (publicly
 4 or otherwise), broadcast, distribute and transmit" the enumerated items in "any interactive
 5 software product published or developed by EA or under license from EA." Compl. Ex. A, at ¶
 6 I(b) & 3 ¶ 1.03 (definition of "Licensed Products"). In granting EA the right and license, but not
 7 the obligation to such use, the License gives EA complete discretion to include or not include
 8 Green Light's renderings in any video game.

9 Nor does the License require EA to obtain "comment or approval" from Green Light
 10 before using a Green Light logo or image. *See* Compl. ¶¶ 16-17. PAD is apparently referring to
 11 Section II of the License, titled "Cooperation," but that section provides that "[a]s reasonably
 12 requested by EA, [Green Light] will deliver to EA" team images and that "[Green Light] will
 13 cooperate reasonably with EA" in granting EA access to Green Light cars. Compl., Ex. A ¶ II.
 14 In other words, Green Light had the obligation to cooperate with and provide material to EA.
 15 EA had no obligation to seek approval or comment from PAD or Green Light with respect to the
 16 images that EA would use in any game.

17 Moreover, the express purpose for Green Light's "cooperation" obligation was to enable
 18 "EA to authentically recreate the Team Cars, Team Marks, and/or Sponsor Marks." *Id.* No
 19 provision of the License requires EA to include in *NASCAR 08* a fanciful car design that bears no
 20 resemblance to the actual Green Light truck.

21 In *Weinstein v. Saturn Corp.*, No. C-07-0348 MMC, 2007 WL 1342604, at *2 (N.D. Cal.
 22 May 8, 2007), this Court dismissed a claim for breach of a nonexistent contractual obligation.
 23 There, the plaintiff sued Saturn Corporation for failing to enable the "OnStar" system in the
 24 Saturn VUE vehicle to navigate automated phone systems. *Id.* The Court dismissed the claim
 25 without leave to amend, reasoning that the vehicle sale contract at issue did not require the VUE

26
 27 ⁷ The License is the sole source of the parties' contractual obligations. PAD does not, and
 28 cannot, allege that the parties agreed to any obligations beyond those set forth in the License,
 because the License contains an integration clause stating that it "constitutes the entire
 understanding between the parties hereto with respect to the subject matter hereof." Compl.

1 to have that feature. *Id.*

2 The same reasoning applies here. The License does not impose the contractual
3 obligations PAD asserts that EA breached. Moreover, in light of the plain language of the
4 License and its integration clause, PAD cannot allege facts that would constitute a breach. The
5 Complaint therefore should be dismissed with prejudice under Fed. R. Civ. P. 12(b)(6). *See*
6 *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984) (“A complaint may
7 be dismissed as a matter of law for . . . : (1) lack of a cognizable legal theory or (2) insufficient
8 facts under a cognizable legal claim.”).

9 **C. PAD Alleges No Damages Proximately Caused by the Alleged Breach.**

10 This motion should be granted for an additional reason: PAD fails to allege damages
11 proximately caused by the alleged breach. *See* Cal. Civ. Code § 3300; *McEldowney v. Nat’l*
12 *Conference of Bar Examiners*, 837 F. Supp. 1062, 1064 (C.D. Cal. 1993) (granting motion to
13 dismiss where the alleged damages resulted from a “supervening cause”).

14 In a breach of contract case, proximate causation requires that general damages be
15 foreseeable, or that the defendant knew or should have known of any special damages, under the
16 rule set forth in *Hadley v. Baxendale*, 156 Eng. Rep. 145 (1854), and recognized under California
17 law:

18 First, general damages are ordinarily confined to those which
19 would naturally arise from the breach, or which might have been
20 reasonably contemplated or foreseen by both parties, at the time
21 they made the contract, as the probable result of the breach.

22 Second, if special circumstances caused some unusual injury,
23 special damages are not recoverable therefor unless the
24 circumstances were known or should have been known to the
25 breaching party at the time he entered into the contract.

26 *Brandon & Tibbs v. George Kevorkian Accountancy Corp.*, 226 Cal. App. 3d 442, 455-56 (1990)
27 (emphasis added).

28 Here, PAD alleges that “[a]s a result of [the *Dallas Business Journal*] article, [PAD’s]
non-profit status has been jeopardized and Green Light Racing’s long term viability has been
compromised.” Compl. ¶ 18 (emphasis added). PAD claims, inexplicably, that “all” of these

Ex. A, at 6 ¶ 7.08.

1 consequences are “the proximate result of the breach of contract by [EA]” and that PAD has
 2 suffered \$5,000,000 in damages. Compl. ¶¶ 18-19.

3 The injuries PAD alleges can in no way have been “reasonably contemplated or foreseen
 4 by both parties, at the time they made the contract, as the probable result of the breach” of the
 5 License. *Brandon & Tibbs*, 226 Cal. App. 3d at 455-56. Moreover, PAD does not and cannot
 6 allege that EA knew or should have known of any special circumstances that would give rise to
 7 such damages upon a breach of the License. There is no allegation that – at the time the parties
 8 entered into the License in April 2007 – either party could have anticipated the *Dallas Business*
 9 *Journal* article that was published in July 2007. Nor is there any allegation that in April 2007,
 10 EA knew or should have known of PAD’s relationship with Green Light.

11 PAD’s alleged damages fail the test of proximate causation because there simply is no
 12 causal link between (i) EA’s decision to include an image of the actual Green Light truck, and
 13 not Green Light’s fanciful rendering, in EA’s *NASCAR 08* game, and (ii) the *Dallas Business*
 14 *Journal*’s publication of the article entitled, “Nonprofit Fuels Race Team” (whose accuracy PAD
 15 does not dispute). EA could not have foreseen the facts that led to the publication of that article:

- 16 • The *Dallas Business Journal* reporter independently decided to investigate the
 17 unusual ownership by an anti-drug non-profit organization of a NASCAR team.
 18 EA had nothing to do with that decision, and the Complaint does not allege
 19 otherwise.
- 20 • The reporter unearthed sufficient facts about the relationship between PAD and
 21 Green Light to write a publishable article. EA’s conduct had nothing to do with
 22 that circumstance, and the Complaint does not allege otherwise.
- 23 • The *Dallas Business Journal* independently decided to publish the article. Again,
 24 EA had nothing to do with that decision, and the Complaint does not allege
 25 otherwise.

26 Nor is there any causal link between EA’s conduct and the alleged fallout from the
 27 publication of the *Dallas Business Journal* article: “[PAD’s] non-profit status has been
 28 jeopardized and Green Light Racing’s long term viability has been compromised.” Compl. ¶ 18.

1 Those consequences are not foreseeable results of the alleged breach:

- 2 • PAD's non-profit status would not be in jeopardy if the organization had
- 3 complied with Federal tax laws. EA had nothing to do with PAD's apparently
- 4 aggressive interpretation of those laws, and the Complaint does not allege
- 5 otherwise.
- 6 • EA cannot be blamed for Green Light's financial condition. Even before any
- 7 alleged breach by EA, Green Light faced financial pressures. Mr. Christensen
- 8 described Green Light as a "break-even proposition[]." Ex. 1 (Article), at 2.
- 9 According to the article, "the team's drug-education efforts have had to take a
- 10 back seat to raising money to keep the team competitive with big names." Ex. 1
- 11 (Article), at 2. EA is not to blame for any financial difficulties faced by Green
- 12 Light.

13 Because PAD alleges no damages proximately caused by EA's alleged breach, the
14 Complaint should be dismissed under Fed. R. Civ. P. 12(b)(6).

15 **D. PAD's Request for Legally Unavailable Relief Should Be Stricken.**

16 For the reasons described above, the Complaint should be dismissed with prejudice. If,
17 however, the Court does not dismiss the Complaint in its entirety, it should strike PAD's prayer
18 for punitive and exemplary damages and attorneys' fees because they are not available in this
19 breach of contract action as a matter of law.

20 A motion to strike should be granted as to "any part of the prayer for relief when
21 damages sought are not recoverable as a matter of law." *Bureerong v. Uvawas*, 922 F. Supp.
22 1450, 1479 n.34 (C.D. Cal. 1996); *State of Cal. Dep't of Toxic Substances Control v. Alco*
23 *Pacific, Inc.*, 217 F. Supp. 2d 1028, 1046 (C.D. Cal. 2002) (granting motion to strike prayer for
24 attorneys' fees). PAD's improper request for three forms of relief that are unavailable in this
25 case as a matter of law – punitive damages, exemplary damages, and attorneys' fees – should be
26 stricken.

27 Punitive and exemplary damages may not be awarded for a breach of contract
28 unaccompanied by a tort. *See* Cal. Civ. Code § 3294(a) (exemplary and punitive damages are

1 available for "breach of an obligation not arising from contract"); 1 Witkin Summary of
 2 California Law, Ch. I (Contracts) § 876 ("[P]unitive damages are never recoverable for breach of
 3 contract, no matter how wilful or malicious, except where the wrongful act is also a tort.").
 4 Because the Complaint fails to allege any tort, punitive and exemplary damages are unavailable
 5 as a matter of law.

6 Nor may PAD recover its attorneys' fees in this action. A prevailing party is not entitled
 7 to attorneys' fees in the absence of a contractual or statutory right to such fees. Cal. Code Civ. P.
 8 § 1021; *Int'l Marble & Granite of Colo., Inc. v. Congress Financial Corp.*, 465 F. Supp. 2d 993,
 9 1001 (C.D. Cal. 2006). The License does not entitle PAD to attorneys' fees. *See* Compl. Ex. A.
 10 Nor does PAD allege any statutory right to attorneys' fees.

11 PAD's requests for punitive and exemplary damages, *see* Compl., at 6, and for attorneys'
 12 fees, *see* Compl. ¶ 20, and 6, thus are unsupported by law. Those portions of PAD's prayer for
 13 relief therefore should be stricken.

14 IV. CONCLUSION

15 For the foregoing reasons, the Court should dismiss the Complaint without leave to
 16 amend or, in the alternative, should strike the portions of PAD's prayer for relief seeking
 17 punitive damages, exemplary damages, and attorneys' fees.

18
 19 Respectfully submitted,

20 Dated: October 3, 2007

KEKER & VAN NEST, LLP

21
 22 By: s/R. James Slaughter

23 R. JAMES SLAUGHTER
 24 MICHAEL K. STERN
 25 Attorneys for Defendants
 26 ELECTRONIC ARTS INC.
 27
 28

EXHIBIT 1

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Dallas Business Journal - July 9, 2007

<http://dallas.bizjournals.com/dallas/stories/2007/07/09/story2.html>

Dallas Business Journal

BUSINESS PULSE SURVEY: Do you agree with Southwest Airlines' decision to tell passengers to

Nonprofit fuels race team

Watchdogs question anti-drug funds' use for NASCAR trucks

Dallas Business Journal - July 6, 2007 by [Dave Moore](#) Staff Writer

STORY IMAGES



About 17 years ago, a Garland charity set out to give schools a lesson plan to fight drug abuse.

The charity doesn't seem to have rewritten much curricula, but it sure has built up one heck of a real estate and NASCAR portfolio.

Federal tax returns from 1997 to 2004 show that the People Against Drugs Affordable Housing Agency has gone through \$21 million in program-service expenses and built up about \$3.5 million in assets, which include the Country Creek Apartments in Garland and Greenlight Racing Inc., a NASCAR truck team based in Mooresville, N.C.

Now the charity's founder, former drag racer Gene Christensen, is running for Congress against 25-year incumbent Republican Ralph Hall and former Frisco Mayor Kathy Seei.

And his unconventional approach to drug education has raised the eyebrows of some nonprofit observers.

"Is the race car team being operated to the benefit of the charity, or is it a vehicle for the team owner to fund a race team?" said Daniel Borochoff, founder of the American Institute for Philanthropy, an Illinois-based nonprofit watchdog group. "What's driving the race car team? Is it the charitable purpose of educating youth on drugs, or is it to allow him to fund his race-car interest or hobby?"

"That's what shouldn't be going on," Borochoff said. "They really need to justify if it's in the highest and best use for the money."

Christensen said while the People Against Drugs lesson plan hasn't been picked up much in classrooms, its anti-drug message is being very effectively delivered through his NASCAR team, which is a subsidiary of the nonprofit.

"The truth is, race car drivers are idols, and NASCAR is an untainted sport," Christensen said. "NASCAR holds all the drivers up to high expectations."

But Borochoff said given the logic of racing cars to prevent drug abuse, "You could set up a nonprofit bordello to study sexuality."

In 2004, the most recent year available for financial review via IRS 990 tax returns, People Against Drugs had revenue totaling \$4.3 million.

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About half of that came from rents paid at the Country Creek Apartments, according to papers provided by Christensen. Most of the rest came from his nonprofit's other revenue-producing enterprise: Greenlight Racing.

Racing money doesn't mingle with housing money, Christensen said, and both operations are break-even propositions.

A distant memory

People Against Drugs has outlasted McGruff the Crime Dog, herds of wannabe Roger Penskes and slum housing to put two pickup trucks in the NASCAR Craftsman Truck Series and to house more than 100 low-income residents in relative comfort at the 296-unit Country Creek apartment complex at 1702 N. Jupiter Road.

But most people who've watched a People Against Drugs truck compete, or who've lived in its apartment complex, might not have a clue that the organization exists.

The only hint to passers-by that Country Creek is connected to the charity is a faded, rusty sign that says "People Against Drugs Office" that hangs outside a converted apartment just south of the apartment manager's office.

The office has become a collecting point for paint brushes, baseball hats, a bag of corn chips and boxes of photographs showing off Christensen's political connections and community involvement.

Pointing to one picture, he says People Against Drugs donated more than \$1,000 to help treat "Trooper," a blind Labrador retriever that wandered out into the street and was struck by a vehicle. When asked what paying a dog's vet bill has to do with drug prevention, he said the dog would visit senior citizen homes. Later, he faxed the Dallas Business Journal an article indicating the dangers of elderly drug abuse.

Above and to the right of the dog's picture is a letter dated September 1998 from the Office of National Drug Control Policy, urging Christensen to help find a way to enlist NASCAR into an anti-drug education campaign. Its writer, Judi Kosterman, has since left the office, as have many who Christensen has encountered in his 17 years in the anti-drug effort.

People Against Drugs is a distant memory to Garland police spokesman Joe Harn. "When he was starting that and talking about that, that's when I was assigned to (the) narcotics" unit, Harn said. "I haven't heard about (the charity) for awhile."

Racing for drug education

Christensen said he introduced race cars into the drug-education picture in 1989, when he drove drag cars in California. He said he worked with "McGruff" at the Orange County Sheriff's office to take children to the races, and spoke to them about drug abuse.

He met NASCAR driver Bobby Dotter at a West Coast NASCAR event, where Dotter was winning races. Christensen and Dotter pooled their resources and moved to the Craftsman Truck series, where competing was less expensive.

The pair introduced Greenlight Racing to the truck series in 2001 under the umbrella of People Against Drugs. Today they own and consistently race two Chevrolet Silverado pickups -- one known informally as the "Lester Buildings 07" car, the other as the "Garmin/GPS Store 08" car, after their primary sponsors -- and the team is entirely funded by People Against Drugs. The truck-sponsorship fees are paid to Greenlight Racing, which does business as People Against Drugs.

Dotter says that, lately, the team's drug-education efforts have had to take a back seat to raising money to keep the team competitive with big names like Jack Roush, who seems to have an inexhaustible supply of sponsorship cash and 24 national championships under his belt.

"Back four years ago or so, when I was the full-time driver for the team, we'd, throughout the year,

in different race markets, we'd go and hit schools with the truck and I'd talk to the kids about how I got into racing and staying clean and staying away from stuff, and how that was good," said Dotter, who lives in North Carolina and manages the team's racing operations. "But as we've gotten to the point now where we're constantly changing drivers and bringing drivers in and stuff, it's not been as easy to do that."

Christensen, however, maintains that he still goes out to schools and talks about the dangers of drugs. And, until recently, he pointed to the promise that EA Sports, a California videogame producer, intended to feature a "People Against Drugs o8" truck with the prominent message, "Be Drug Free," in its new "NASCAR o8" videogame, which is expected to be released shortly.

Christensen said the exposure to People Against Drugs would be worth millions of dollars, given the playing time children and young adults will pour into the game.

But, in an e-mail to the Dallas Business Journal, Randy Chase, product manager for EA Sports, said the Greenlight truck will carry the "Garmin/GPS Store" banner in the videogame.

Christensen said that, because the charity has the right to OK any Greenlight truck likeness in the "NASCAR o8" game, he may sue EA Sports unless it changes the car's logo in the game.

"Sponsors pay for that," he said. "Garmin declined to pay (Greenlight). That's a no-no."

Chase couldn't be reached at presstime about whether the threat of litigation by the nonprofit would alter his plans for the Greenlight car in the videogame.

Exposure time

Right now, an orange People Against Drugs decal occupies just a 4-inch-by-4-inch space behind the cab on both sides of the o7 and o8 trucks in the Craftsman Truck Series, among many other stickers.

Eric Wright of Joyce Julius & Associates Inc. in Ann Arbor, Mich., which studies the advertising value of media coverage, estimated that the Garmin/GPS Store truck attracted \$229,245 worth of free media exposure in 2006, while the Lester Buildings vehicle landed \$239,300 worth of footage in 2006.

"Thus far, the People Against Drugs logo has not received any clear and in-focus exposure time during the truck event telecasts," Wright told the Business Journal in an e-mail.

Christensen said the value of People Against Drugs' involvement in owning a NASCAR team is the access the charity provides to drivers and team owners.

Charity watchdog Borochoff pointed out that, instead of owning a team, People Against Drugs could simply sponsor a truck unrelated to the charity to get its message out, similar to how other NASCAR teams work.

But Christensen said People Against Drugs wouldn't be able to keep any assets if it simply paid a team to appear at drug-free events.

"You'd only get three to four appearances out of them" a year, Christensen said. "That wouldn't be able to put the message out. People Against Drugs was designed to be self-sufficient. That's why the (Resolution Trust Corp.) allowed us to create this."

Real estate's role

About 20 years ago, Christensen said, he sobered up and, with the help of friends, launched the People Against Drugs charity to prevent others from falling into addiction.

One key element of the plan, according to Christensen, was to fund the venture through real estate purchased through the Resolution Trust Corp. The RTC was formed by the federal government to

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dispose of properties left behind when savings and loans failed in the 1980s.

A bumper crop of defaulted properties and reasonable land prices drew Christensen to North Texas. He'd been sober for a year when he moved here in 1988, he said, and thought up the idea of People Against Drugs with fellow members of 12-step programs.

He met his former wife, Carrie Flodter, at a 12-step-program meeting in 1989. A year later, Christensen and others, including Flodter, filed for People Against Drug's tax-exempt status with the federal government and in the state of California, where Christensen was born.

Tax exemptions allow organizations to avoid paying federal income taxes, and some tax-exempt groups can also qualify for property-tax exemptions. Dallas Central Appraisal District records show that the Country Creek Apartments is exempt from property taxes; a similarly valued Garland apartment complex had estimated taxes of more than \$200,000 in a one-year period.

The People Against Drugs mission statement that was filed with the federal government makes no mention of racing cars or real estate. Nor do the articles of nonprofit incorporation filed in 1991 in California; those documents refer to promoting a "national drug education program beginning at the grade-school level and extending through high school."

A 1992 nonprofit filing in Florida described the charity's purpose this way: to "set and develop (sic) drug free and gang free living environments." About the same time, People Against Drugs was granted nonprofit status in Texas to provide and teach drug- and gang-free living.

Not long afterward, the charity paid \$3.9 million for Garland's Country Creek Apartments, which Christensen said was drug-ridden and rundown at the time.

He planted the palm trees outside the complex's western-most pool himself, he said, and, for awhile, stayed in one of the apartments there. Since at least 1997, the charity has said in its tax return that its purposes are to provide affordable housing to tenants in a drug-free environment and to educate teenagers about the dangers of drug use.

While Christensen showed a 48-page People Against Drugs lesson plan to the Business Journal, he said he couldn't disclose which, if any, schools have adopted the curriculum, citing confidentiality rules.

In 2000, when Christensen began divorce proceedings against Flodter, the five-person People Against Drugs board of directors gave Christensen a \$119,260 loan to help him find a place to live, according to the charity's 2000 tax return.

Christensen remarried last year. He and his wife, Cheryl, recently bought a \$364,000 house in rural Celina, in Collin County, and the couple are planning to travel to Argentina soon to watch prospective drivers race. Christensen said he will pay for the trip out of his own pocket.

His salary is \$145,000 a year at People Against Drugs. He said he draws no salary for his work on the race team.

He's able to afford these expenses, he said, because the nonprofit has a retirement fund set aside for him.

Christensen says that none of the money from People Against Drugs has ever benefited him directly, other than his paycheck.

Though he's been surrounded by cars most of his life, he said, Greenlight Racing and People Against Drugs is a 60-hour-a-week job for him, not a hobby.

"A hobby is golf," Christensen said. "I'm promoting a message."

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Fresh perspective

June 8 signaled the start of Christensen's slow retreat from People Against Drugs.

That's when, just before the Sam's Town 400 truck race at Texas Motor Speedway, he announced his intention to run against incumbent Ralph Hall for Hall's seat in the 4th Congressional District Republican primary.

Christensen has named Suzanne Gosselin, who he also knows through the 12-step program, as his replacement director for the charity.

According to the Center For Responsive Politics, a nonpartisan group in Washington, D.C., that tracks campaign contributions, Christensen donated \$40,400 to Republican causes and candidates at the national level between 1996 and 2006.

He's running for Congress, Christensen said, because he thinks he can bring a fresh perspective to Washington.

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